Supreme Court, U.S.
FILED
MAR 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1341

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

SAN FERNANDO VALLEY NEIGHBORHOOD LEGAL SERVICES, INC., AS COUNSEL FOR VERNICE DUBOSE, ET AL., PETITIONERS

V.

JACK KEMP, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.

REPLY TO BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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This brief is filed in reply to the Brief for the Federal Respondents in Opposition.

ARGUMENT

1. Petitioner was precluded from invoking collateral estoppel until the decision of the Ninth Circuit in Underwood v. Pierce, 761 F.2d 1342 (9th Cir. 1985) became final when affirmed by this Court in Pierce v. Underwood, 487 U.S. ___, 56 U.S.L.W. 4806 (1988).

The Secretary of the Department of Housing and Urban Development (HUD) opposes the Petition for Certiorari for San Fernando Valley Neighborhood Legal Services, Inc. (SFVNLS) on the grounds that SFVNLS failed to argue the issue of collateral estoppel before the court of appeals. Brief for the Federal Respondents in Opposition (Brief in Opposition) at 5-6. HUD further asserts that the collateral estoppel issue was raised in the district court, implying that it was abandoned on appeal. Id. at 6n.4.

While collateral estoppel was not argued by SFVNLS before the Connecticut district court, Amicus Curiae Western Center on Law and Poverty, whose entitlement to fees was initially established in Underwood v. Pierce, 547 F.Supp. 256 (C.D. Cal. 1982), argued that the California district court decision should be given preclusive effect before the Connecticut court. 1/ As HUD argued in its response, however, it was premature to invoke collateral estoppel at that time because the interpretation of the settlement agreement, then pending on appeal before the Ninth Circuit, was

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1/ SFVNLS has been unable to locate a copy of the Amicus memorandum submitted by Western Center, which SFVNLS learned of from John S. Koppel, counsel for HUD. SFVNLS has located in its files the Federal Defendants' Response to the Amicus memorandum, which is cited below. According to Mr. Koppel, attorney James Sturdevant also submitted arguments on collateral estoppel before the district court.

subject to de novo review. 2/ HUD pointed out that the "interpretation of a settlement agreement, like that of a contract, is subject to de novo review by [the Ninth Circuit]." Petarsky v. Ariyoshi, 695 F.2d 352, 354 (9th Cir. 1982), citing Kinnitas Reclamation District v. Sunnyside Valley Irrigation District, 626 F.2d 95, 98 (9th Cir. 1980). HUD argued that this circumstance brought the case under the rule that the operation of an otherwise final judgment as collateral estoppel is suspended when it is subject to a proceeding de novo. See, 1B Moores Federal Practice, para. 0.416[3] at 521-22.

Although HUD's position would

2/ Federal Defendants' Response to Supplemental Brief of Amicus Curiae in Support of San Fernando Valley Neighborhood Legal Services at 3-4.

arguably have extended existing law, which appears to apply the exception only where the entire proceeding is vacated by an appeal (Id. at 522), it was a reasonable position, particularly given the inevitability that the Ninth Circuit would rule on the interpretation of the settlement agreement, thereby superseding any determination by the California district court. Perhaps recognizing this circumstance, the Connecticut district court did not even address the collateral estoppel argument in its decision. See, Dubose v. Pierce, 579 F.Supp. 937 (D. Conn. 1984).

The Ninth Circuit decision did address the issue, agreeing with the conclusion of the district court. Underwood v. Pierce, 761 F.2d 1342, 1345 (9th Cir. 1985). Although the appeal in Underwood had been taken nearly two years before the appeal in Dubose, the decision

of the Ninth Circuit was not issued until May 23, 1985, more than a week after the Second Circuit's decision in Dubose v. Pierce, 761 F.2d 913 (2d Cir. 1985) on May 14, 1985. Thus, the Ninth Circuit's decision was not entitled to collateral estoppel effect in Dubose until it became final with this Court's affirmance of the fee award last June.

In its Petition for Rehearing before the Second Circuit following this Court's decision in Underwood, SFVNLS asserted that "Affirming Judge Blumenfeld with Regard to Settlement Administration is Inconsistent with the Supreme Court's Affirmation of the Fee Award in Underwood v. Pierce." Petition for Rehearing at 3. While SFVNLS should have specifically invoked the term collateral estoppel, the inconsistency between the Ninth Circuit and Second Circuit decisions was put in issue.

CONCLUSION

No existing caselaw gives direction as to the appropriate application of collateral estoppel principles where, as here, a consolidated settlement agreement results in parallel litigation in different jurisdictions. For that reason, guidance from this Court is appropriate.

DATED: March 27, 1989

Respectfully submitted,

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